In the United States Bankruptcy Court
for the
Southern District of Georgia
Brunswick Division

In the matter of:	)	
	)	Adversary Proceeding
KEVIN HICKS	)	
(Chapter 7 Case 91-20534)	)	Number 92-2028
	)	
Debtor	)	
	)	
	)	
KEVIN HICKS	)	
	)	
Plaintiff	)	
	)	
	)	
	)	
v.	)	
	)	
CHARLA HICKS	)	
	)	
Defendant	)	

MEMORANDUM AND ORDER

A hearing was held on June 24, 1992, upon a Complaint to Determine Dischargeability of a debt pursuant to 11 U.S.C. Section 523(a)(5). Upon consideration of the evidence adduced at trial, the briefs submitted by the parties, and the applicable authorities, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Debtor and his former wife filed a joint Chapter 13 bankruptcy petition on July 1, 1991,

using the same attorney. On September 20, 1991, Debtor and his wife were divorced. The parties entered into a "Contract and Agreement" (settlement agreement)which resolved certain divorce-related issues including child support. This agreement was prepared by the same attorney who helped them file bankruptcy. The Defendant/Wife was otherwise unrepresented and had no personal contact with that attorney at the time of the divorce and settlement proceedings.

The settlement agreement was made part of the Final Judgment and Decree of Divorce entered in the Glynn County Superior Court on September 20, 1991. The divorce decree states that the parties expressly waived findings of fact and conclusions of law. The settlement agreement provides that Plaintiff/Husband is to pay "$69.24 per child bi-weekly" or approximately $300.00 per month in child support, with Defendant to have permanent custody of the two children. In that agreement, Plaintiff was also required to pay medical insurance for the children, which is approximately $102.00 per month. Also, Plaintiff was given the marital residence and was responsible for the mortgage payment thereon.

At issue in this complaint is Plaintiff's obligation to make payments on a car awarded to Defendant. The settlement agreement provides that husband shall retain the Datsun automobile and that wife shall retain the 1988 Toyota automobile. The agreement further provides that the car shall be paid in the parties' Chapter 13 bankruptcy plan, and "[i]n the event that for any reason the parties' Wage Earner Plan is terminated, Plaintiff agrees to assume and pay off, as due, the outstanding indebtedness upon said automobile and hereby agrees to indemnify and hold harmless the Defendant from any claims against said automobile." This obligation was not designated as alimony or property division in the settlement agreement.

The agreement does not specifically provide Defendant with any alimony. At trial Defendant testified that she did not claim more money from the Plaintiff (either alimony or additional child support) in order to be assured that her reliable car would be paid for. Defendant testified that she showed the divorce agreement to a local attorney who offered to help her and who suggested changes in the agreement regarding Plaintiff's assumption of debt, which are reflected in the agreement.

Defendant testified that she was receiving $300.00 per month in child support and approximately $280.00 per month in food stamps at the time of the divorce. Defendant testified that she was not working at the time of the divorce, but previously had a job making $500.00 per month until she was terminated. Defendant testified that she planned to attend school this fall in order to improve her education and skills. When wife earns the $500.00 per month income, her state aid is suspended. Thus, her maximum income for purposes of this case is $800.00 per month to support three persons.

Plaintiff testified that his gross income as a Brunswick police officer was approximately $1,850.00 per month at the time of the divorce, with a net income of approximately $1,350.00. Plaintiff's income after child support is approximately $1,050.00. As noted previously, Defendant additionally pays $102.00 per month for the children's medical insurance.

Defendant testified that the car payment at issue was approximately $150.00 per month. Defendant further testified that she needed the car not only for her transportation, but also for her children who will be attending school in the fall.

On or about March 9, 1992, the parties filed a Motion to Convert their Chapter 13 case to a Chapter 7 bankruptcy case. At the first creditors' meeting the collateral of Trust Company Bank was abandoned. The collateral included the marital home, real estate, and the Toyota automobile awarded Defendant in the settlement agreement. When Defendant was informed that she was going to lose her vehicle, she sought counsel independent of Plaintiff which led to the filing of this dischargeability complaint.

CONCLUSIONS OF LAW

Congress in 11 U.S.C. Section 523(a)(5) created an exception to discharge for any debt

> . . . to a spouse, former spouse, or child of the debtor, for alimony to,

> maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record . . . designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support.

11 U.S.C. Section 523(a)(5). The Eleventh Circuit mandates that "what constitutes alimony, maintenance, or support will be determined under the bankruptcy laws, not state laws." Harrell, 754 F.2d 902 (11th Cir. 1985) (Quoting H.R.Rep.No. 595, 95th Cong., 1st Sess., 364 (1977) reprinted in 1978, U.S. Code Cong. & Admin. News 5787, 6319). To be declared non-dischargeable, the debt must have been actually in the nature of alimony, maintenance or support. Harrell, 754 F.2d at 904.

The non-debtor spouse (or spouse asserting an exception to dischargeability) has the burden of proving that the debt is within the exception to discharge. Long v. Calhoun, 715 F.2d 1103 (6th Cir. 1983). The exceptions to discharge in Section 523 must be proved by a preponderance of the evidence. Grogan v. Garner, __ U.S. __, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991).

A determination as to whether or not a debt is in the nature of support requires an examination of the facts and circumstances existing at the time the obligation was created, not at the time of the bankruptcy petition. Harrell, 754 F.2d at 906.[1] *Accord* Sylvester v. Sylvester, 865 F.2d 1164 (10th Cir. 1989); Forsdick v. Turgeon, 812 F.2d 801 (2nd Cir. 1987); Draper v. Draper, 790 F.2d 52 (8th Cir. 1986); Long v. Calhoun, supra. It is the substance of the obligation which is dispositive, not the form, characterization, or designation of the obligation under state law. Bedingfield, 42 B.R. at 645-46; *Accord* Shaver v. Shaver, 736 F.2d 1314, 1316 (9th Cir. 1984); Williams v. Williams, 703 F.2d 1055, 1057 (8th Cir. 1983).

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[1] Harrell overrules In re Bedingfield, 42 B.R. 641 (S.D.Ga. 1983) (Edenfield, J.), only to the extent that it held that "the bankruptcy courts may examine the debtor's ability to pay . . . at the time of the bankruptcy proceeding." Bedingfield, 42 B.R. 641 (S.D.Ga. 1983). The Eleventh Circuit in Harrell concluded that only the facts and circumstances existing at the time the decree or agreement was entered are to be considered. Harrell, 754 F.2d at 906-07.

According to the Eleventh Circuit in Harrell:

> The language used by Congress in Section 523(a)(5) requires bankruptcy courts to determine nothing more than whether the support label accurately reflects that the obligation at issue is 'actually in the nature of alimony, maintenance, or support.' The statutory language suggests a simple inquiry as to whether the obligation can legitimately be characterized as support, that is, whether it is in the nature of support.

Harrell, 754 F.2d at 906 (emphasis original). Although the Harrell court determined that only "a simple inquiry" was needed, the court did not set forth the guidelines or factors to be considered. The Bankruptcy Court may consider state law labels and designations although bankruptcy law controls. *See* In re Holt, 40 B.R. 1009, 1011 (S.D.Ga. 1984) (Bowen, J.)

The Bankruptcy Court must determine if the obligation at issue was intended to provide support. Calhoun, 715 F.2d at 1109. In making its determination, the Court should "consider any relevant evidence including those facts utilized by state courts to make a factual determination of intent to create support." Id. If a divorce decree incorporates a settlement agreement, the Court should consider the intent of the parties in entering the agreement; if a divorce decree is rendered following actual litigation, the Court should focus upon the intent of the trier of fact. In re West, 95 B.R. 395 (Bankr. E.D.Va. 1989). *See generally* In re Mall, 40 B.R. 204 (Bankr. M.D.Fla. 1984) (Characterization of an award in state court is entitled to greater deference when based on findings of fact and conclusions of law of a judge as opposed to a rubber stamped agreement incorporated into a divorce decree); In re Helm, 48 B.R. 215 (Bankr. W.D.Ky. 1985) ("It is not those questions of support which have been fully litigated and adjudicated in the state court system which are now subject to second-guessing by bankruptcy judges, sitting as 'super-divorce courts.' It is only those cases . . . in which former spouses settle their support differences by agreement albeit with resulting state court approval, that bankruptcy courts may later reopen and re-examine.")

In order to determine if an obligation is actually in the nature of support, the following

factors must be examined:

1) If the circumstances of the parties indicate that the recipient spouse needs support, but the divorce decree fails to explicitly provide for it, a so called "property settlement" is more in the nature of support, than property division. Shaver, 736 F.2d at 1316.

2) "The presence of minor children and an imbalance in the relative income of the parties" may suggest that the parties intended to create a support obligation. Id. (Citing In re Woods, 561 F.2d 27, 30 (7th Cir. 1977).)

3) If the divorce decree provides that an obligation therein terminates on the death or remarriage of the recipient spouse, the obligation sounds more in the nature of support than property division. Id. Conversely, an obligation of the donor spouse which survives the death or remarriage of the recipient spouse strongly supports an intent to divide property, but not an intent to create a support obligation. Adler v. Nicholas, 381 F.2d 168 (5th Cir. 1967).

4) Finally, to constitute support, a payment provision must not be manifestly unreasonable under traditional concepts of support taking into consideration all the provisions of the decree. *See* In re Brown, 74 B.R. 968 (Bankr. D.Conn. 1987) (College or post-high school education support obligation upheld as non-dischargeable).

As applied to the facts of this case, I conclude that the Defendant/Spouse has proved by a preponderance of the evidence that the obligation at issue is actually in the nature of support.

The circumstances at the time the settlement agreement was entered into clearly indicate

Defendant needed support at that time. The agreement failed to provide any designated "alimony" and provided only for payments on the Toyota automobile as a means of support for Defendant. The other payments made by Plaintiff were for child support and the children's insurance.

The Defendant proved a wide disparity of income between herself and her former husband. Defendant's income at the time of divorce was approximately $580.00 per month, including the $280.00 per month in state assistance. Plaintiff's gross income was over three times that amount. Defendant also had limited job prospects at the time of the divorce considering her education and child care needs. Defendant testified that she made only $500.00 per month at her previous job.

Based on these facts the wife clearly needed payment of the automobile debt as an element of support for herself and the minor children. The imbalance of income was substantial and was only partially offset by payment of this debt. Even with that payment included, wife's total income potential was $800.00 and husband's remained at $1,000.00. The transfer of an additional $150.00 per month for a temporary time until the car is paid for is clearly in the nature of support.

Finally, the payment provision is not manifestly unreasonable considering the entire divorce decree and agreement. Therefore notwithstanding the fact that the obligation does not expressly terminate upon wife's death or remarriage the other factors are all present for a finding that payment of the debt secured by wife's automobile was actually in the nature of support.

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that the obligation of Kevin Hicks to Charla Hicks for payment of the automobile debt is non-dischargeable in this proceeding.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This _____ day of July, 1992.